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No.

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In the Supreme Court of the United States

October Term, 1982

LAWRENCE GOLDSTEIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

The Court of Appeals erred in affirming the federal mail fraud and false statement convictions of Petitioner:

(A) on the theory that there was a federal fiduciary duty to disclose certain matters to both the United States Government and to the State of Kansas certain facts relating to Petitioner's business when there was no federal or state law or regulation expressly imposing a fiduciary duty or requiring such disclosure;

(B) when, under the constructive fraud doctrine of some circuit courts of appeal, Petitioner's appeals cannot stand;

(C) when, under the law of several circuits concerning arguably ambiguous statements, Petitioner's convictions for false statements and mail fraud cannot stand;

(D) when, under the facts of the case, there was no fair notice and warning to the Petitioner that his conduct violated the criminal statutes of the United States.

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No.

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LAWRENCE GOLDSTEIN,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Lawrence Goldstein, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in this case.

OPINION BELOW

The Opinion of the Court of Appeals below (Appendix, p. A1) initially was reported at 649 F.2d 799 (10th Cir. 1981). The Opinion was withdrawn from publication in the bound volume. (Appendix, p. A1). There was no Opinion of the District Court.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 22, 1981, affirming Petitioner's convictions for violations of both 18 U.S.C. Sections 1001 and 1341. Petitioner's conviction under 21 U.S.C. Section 841(a)(1) was reversed. The United States did not seek review of the reversal of the conviction by rehearing or certiorari. Petitioner's timely motion for rehearing by the panel was denied on January 21, 1983. Petitioner's timely motion for rehearing en banc was denied by the Court on February 18, 1983. This petition is filed within sixty (60) days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1). The District Court had jurisdiction over this cause under 18 U.S.C. Section 3231.

STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution is set forth in the Appendix, p. A20. The Sixth Amendment to the United States Constitution is set forth in the Appendix, p. A21. The Federal Mail Fraud Statute, 18 U.S.C. Section 1341, is set forth in Appendix, p. A22. The Federal False Statement Act, 18 U.S.C. Section 1001, is set forth in the Appendix, p. A23. Kansas Medicaid Regulations KAR 30-5-21 and 30-5-26 are set out in the Appendix, pp. A24-A27.

STATEMENT OF THE CASE

Petitioner, who ultimately received a sixty (60) day sentence and fine for his convictions[1] in the District Court, was a registered pharmacist in the State of Kansas. Co-Defendant, Silberg, an employee of Petitioner's business, was also a registered pharmacist and manager of Petitioner's pharmacy. Co-Defendant Jones was an osteopathic physician. All three Defendants were fully licensed to dispense drugs.[2]

Defendant Jones operated the Central Clinic in Kansas City, Kansas. In his practice, Jones frequently dispensed drugs to his patients. Many of these patients were eligible to receive the benefits of the Medicare/Medicaid Programs which included certain prescription drugs. Petitioner's pharmacy was a few blocks away from Jones' clinic. In 1975, Petitioner and Jones agreed that Petitioner's pharmacy would furnish Jones a stock of drugs at the Central Clinic and Jones would receive a small fee for dispensing the drugs. The fee was to reimburse Jones for the cost of supplies (such as bottles) as well as certain overhead-related costs - costs which otherwise would have been incurred by Petitioner's pharmacy. The fees were paid monthly by check.

Reimbursement to those who furnished prescription drugs to eligible recipients was administered by the Kansas Department of Social and Rehabilitation Services (SRS), an agency of the State of Kansas. Reimbursement was made from combined Federal and State funds. The amount

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1. Counts 1-10 of the Information charged violations of 18 U.S.C. Sec. 1341; Counts 11-14 charged violations of 18 U.S.C. Sec. 1001.

2. The facts mentioned in this statement are contained in the Court of Appeals Opinion unless otherwise noted.

of reimbursement to Petitioner's pharmacy was determined by cost studies prepared by Co-Defendant Silberg. The cost studies submitted to SRS by Petitioner's pharmacy did not reflect the dispensing fee to Jones nor the fact that the drugs were dispensed at the Central Clinic. Petitioner's employee, Co-Defendant Silberg, prepared these studies; Petitioner was not personally knowledgeable of the facts and figures used by Silberg to prepare the forms. ROA,[3] Vol. 2, pp. 212-222 (Gov't Ex. 20); Vol. 3, pp. 225-236 (Gov't Ex. 22); 239-257 (Gov't Ex. 24); Vol. 5, pp. 35-42, 41, 89; Vol. 7, pp. 425, 426, 578, 582.

Petitioner or his employees believed that a person they had originally understood to be an employee of SRS had in fact approved the arrangement with Jones. In addition, Jones' attorney thought the arrangement was legal. ROA, Volume 6, pp. 232, 253, 256, 271, 277-78, 317; Volume 7, pp. 426, 432-33, 478-80, 484, 491-93, 520, 541-47, 550-57, 569-72; Volume 8, pp. 634-37, 653, 663, 664, 492-99, 716-720, 723-29.

Petitioner, after the arrangement commenced, went only occasionally to the Central Clinic, never filled a prescription there, and took no part in the billing procedures. ROA, Vol. 6, pp. 244, 247, 274, 284; Vol. 7, pp. 481, 547-548, 561; Vol. 8, p. 654. Contrary to the implications of the Court of Appeals decision, there was in fact no discussion between Petitioner and Jones that the Central Clinic pharmacy would not be registered so that the State could be billed at a higher rate for Medicaid prescriptions. ROA, Vol. 6, p. 265; Vol. 7, pp. 484, 485, 561; Vol. 8, pp. 630-632. Petitioner's pharmacy was validly registered with both the Federal and State Governments. In addition, Petitioner's pharmacy had a "pro-

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3. ROA: Record on Appeal.

vider number" issued by SRS, which identified it as a participant in the SRS administered pharmacy reimbursement plan. A "provider number" was different than a federal or state registration of a pharmacy. The claims were made to SRS for prescriptions filled at the Central Clinic by Petitioner's pharmacy using Petitioner's "provider number". ROA, Vol. 2, pp. 208-09 (Gov't Ex. 16 and 17); Vol. 5, pp. 27-31, 61-62, 70.

When the arrangement started in 1975, Central Clinic was not registered with the Federal Government as an "authorized" location where drugs could be kept. At trial, Jones disputed the government's claims that his clinic was not validly registered. There was no evidence that either Petitioner or any of his employees knew or should have suspected the Central Clinic was not registered. On the contrary, all believed that it was.

The Central Clinic was not registered as a pharmacy with the Drug Enforcement Administration or with the Board of Pharmacy of the State of Kansas because the "pharmacy" there differed substantially from other retail pharmacies such as those operated by Petitioner. It was not open to the public, but rather existed solely to serve Jones' patients. It was not advertised nor were there any signs or physical indications either outside or inside Jones' clinic to indicate that it existed. No one could come into the clinic pharmacy "off the street" with their prescription and have it filled. The clinic pharmacy was stocked with drugs preferred by Jones and routinely prescribed to his patients. It was not a "fully stocked" pharmacy prepared to meet the varying prescription requirements of many physicians. Those involved in the arrangements stated that they did not believe the clinic pharmacy had to be registered because of its unique characteristics. ROA, Volume 6, pp. 248, 249, 266-268, 312; Volume 7, pp. 474-478, 559, 560.

Several government witnesses testified that both the federal and state law required the registration of any location where controlled substances were maintained or from which they were dispensed. However, the witnesses who testified had been to the clinic pharmacy and each declined to say whether the clinic pharmacy was required to be registered.[4] In addition, while several government witnesses were called in rebuttal for the purpose of showing that Jones may or should have known as early as 1977 that he did not have a proper Drug Enforcement Administration registration at the clinic, no evidence was offered that any of the Defendants were aware of this deficiency prior to 1977 or that Petitioner or any of his employees were made aware of it after 1977. As far as Petitioner or any of his employees were concerned, Jones at all times was fully authorized to possess and dispense controlled substances at the Central Clinic. ROA, Volume 5, pp. 89, 155, 166, 167; Volume 6, pp. 271, 284, 312, 322-364; Volume 7, pp. 381-406, 478, 496, 550-559; Volume 8, pp. 604-618, 659-661, 671-678, 745-752.

The government thus charged and convicted Defendants on the grounds that claim forms submitted by Petitioner's pharmacy for drugs dispensed at the Central Clinic constituted false statements and mail fraud in that the Central Clinic was not properly registered and did not have a SRS "provider number'. The government's theory was that Defendants should have known how SRS intended the form to be filled out, even though neither the applicable regulations issued by SRS (Kansas Administrative Regulations 30-5-21 and 30-5-26) required that there be a separate "provider number" nor in fact any "provider number"

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4. All Defendants' convictions for dispensing controlled substances for valid medical reasons from an unregistered location were reversed.

whatsoever.[5] In 1979, amendments were made to KAR 30-5-21 which provided this requirement but, prior to this time, there was no such requirement. Indeed, the claim forms themselves did not state that the "provider number" reflect the location of the pharmacy from which the drugs were dispensed.

The government did not contend that the drugs in fact were not actually dispensed properly. It was the government's essential contention that, under the Kansas Medicaid system for reimbursing pharmacies, Petitioner's pharmacy received a higher fee for dispensing the drugs than would have been the case if reimbursement would have been sought for dispensing drugs at the Central Clinic only. However, the fees received by Petitioner's clinic were never greater than those permitted under the Kansas Medicaid program, and, for the period 7/77 to 7/78, were below the maximum permitted by the program. ROA, Vol. 4 (Gov't Ex. 18); Vol. 5, pp. 46, 62, 53, 120.

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5. The government's trial attorney stated to the Court in response to defense counsels' arguments on motions for judgment of acquittal:

> "Most mail fraud schemes are not by themselves proscribed anywhere specifically and such is the case here. The question of whether or not this specific conduct was a scheme was a question that was properly put to the jury and a question that they properly decided.
>
> "Notwithstanding that, Your Honor, *I think the defendants would have adequate notice that the conduct that they engaged in was not proper in that the basis of the entire Medic-Aid system requires the separate provider number for each separate location where drugs are being dispensed. It's apparent that the fee structure of the Medic-Aid system is dependent upon this separate provider number since the fee, that is, the dispensing fee, is determined based upon the overhead cost for that particular location.*
>
> *"The fact that it's a false statement to indicate to Medic-Aid that a prescription filied one place was, in fact, filled some place else goes without saying. I think it's so obvious that it isn't going to be put anywhere in the regulation."* (Supplemental ROA, pp. 18-19). (Emphasis added).

REASONS FOR GRANTING THE WRIT

I.

The decision below raises an issue of great importance to the criminal justice system—is there a federal common law fiduciary duty under the mail fraud and federal false statement statutes to disclose certain facts when under federal and state law or regulation such a duty is not imposed upon a defendant.

The decision of the Court of Appeals implicitly found a federal fiduciary duty to disclose certain facts to SRS when no such duty was imposed under federal or state law or regulation, and thus upheld Petitioner's convictions under the mail fraud statutes.[6] The Court of Appeals upheld the false statement convictions based on the same reasoning that was used to affirm Petitioner's convictions under the mail fraud statute.

Whether there is in fact a "fiduciary duty" which is governed by "federal" standards and the scope of such duty has attracted the attention of several authors who have criticized judicial decisions in this area and have proposed judicial or legislative solutions to the problem. See, *e.g.*, Morano, "THE MAIL-FRAUD STATUTE: A PROCRUSTEAN BED", 14 John Marshall Law Review 45 (1980); Coffee, "FROM TORT TO CRIME: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics", 19 American Criminal

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6. Some courts define the specific intent required for a conviction under 18 U.S.C. Section 1001 as an intent to deceive as opposed to an intent to defraud. See, *e.g.*, *U.S. v. Lange*, 528 F.2d 1280, 1288 (5th Cir. 1976). However, courts tend to use the term "intent to defraud" and "intent to deceive" interchangeably. See, *e.g.*, *U.S. v. London*, 550 F.2d 206, 213, n. 6 (5th Cir. 1977).

Law Review 117 (1981); Hurson, "LIMITING THE FEDERAL MAIL FRAUD STATUTE - A LEGISLATIVE APPROACH", 20 American Criminal Law Review 423 (1983). Thus, Morano states:

> "Through analysis of the expansive use of the mail-fraud statute, especially as a result of the strained, Pickwickian meaning that has been given by the courts to a 'scheme to defraud', this article will show that concern for due process requires that the courts cease prosecuting fiduciary fraud under Section 1341. Furthermore, the *criminal* sanctions of Section 1341 should not be imposed on those whose conduct merely falls short of absolute honesty towards others. One way to avoid such an excess in construing Section 1341 is not to allow an indictment which alleges only that the defendant's practices prevented the victim from making a better bargain than he did, even though the bargain struck was well within the going rate." *Morano, op. cit.*, at pp. 41-50.[7]

Morano observes that:

> "If someone can be convicted of mail fraud for the vague reason that his 'conduct . . . fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general business life of members of society', then everyone is at the mercy of changing community moral values of honesty, loyalty, and trust. One is threatened by the prospect of prosecution for mail fraud, notwithstanding a transaction's fairness, if only because a personal interest in the transaction was not disclosed.

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7. In the instant case, the government's principal complaint was that SRS paid too much for the services rendered - even though Petitioner's pharmacy was reimbursed at or below the going rate under SRS regulations.

Of course, openness and loyalty on the part of an employee, whether in the private or public sector, is commendable. However, only in a theocracy like Calvin's Geneva or colonial Salem would *criminal* sanctions be expected for such nondisclosure." Footnotes omitted. *Op. cit.* at p. 81.

Morano has several solutions to the problem which are in part (as relevant to the instant case):

"Because conviction for mail fraud, a felony, may bring imprisonment for five years on each count, and because each mailing may constitute a separate count, it seems much too harsh to convict a defendant under this statute for any thing less than seriously criminal conduct. Accordingly, a court should reverse the conviction of any defendant charged with violating section 1341 through no more than a violation of fiduciary duty. To be sufficient, an indictment should allege that the defendant used a fraudulent scheme to obtain *tangible* gain at another's expense.

"*Moreover, the willingness of courts to find the requisite intent to defraud from mere nondisclosure of relevant information should be obviated by a jury instruction that does not beg the question. The jury instruction should explain that when the defendant's conduct can be explained by other than fraudulent intent, then the prosecution has not met its burden of proof of fraudulent intent beyond a reasonable doubt.*"[8] (Emphasis added) (Footnotes omitted) *Op. cit.*, at p. 82.

Professor Coffee states:

"Nevertheless, before one accepts the equation that a knowing fiduciary breach equals a 'scheme to defraud',

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8. No such instruction was given in the instant case.

some troubling consequences with this proposition need to be considered. Four stand out and will be briefly examined below:

"(1) The concept of a fiduciary relationship is an inherently vague one, which is far more expansive than it first appears;

"(2) Significant differences exist among state jurisdictions in terms of the duties that fiduciaries owe, thereby possibly creating significant disparities in the coverage of federal criminal law depending upon the applicable state civil law;

"(3) If the result of criminalization of fiduciary breaches is also their federalization, this conflicts with the principle of deference to state corporate law which recent Supreme Court decisions have established;

"(4) Perhaps most important, the 'internal affairs' rule of corporate law under which the law of the jurisdiction of incorporation controls as to all intracorporate disputes seems unreconcilable with the policies underlying the traditional criminal law rule that one jurisdiction will not enforce the penal statutes of another." *Coffee, op. cit.*, at p. 150.

Coffee suggests as a solution to the problem a "causation" standard and a requirement that federal law enforcement should not ensue until after state and private remedies have been exhausted.

In the instant case, did the law of Kansas impose upon Petitioner, who was the operating head of his pharmacy, a corporation, a duty to know and properly interpret the regulations governing the Kansas Medicaid program and to check personally the forms and data submitted by one of his employees? In fact, there was no evidence that any Kansas law imposed any such duty upon Petitioner.

Review of this case would provide the lower courts, prosecutors, defendants and their lawyers with some clear idea of what acts are criminal under the mail fraud and false statement statutes.

And see generally, *Morano, op. cit.*, at pp. 60-75; *Coffee, op. cit.*, pp. 130-42; and *Hurson, op. cit.*, pp. 444-448, discussing the broad reach of judicial decisions under the mail fraud statute interpreting a fiduciary duty to disclose. *Hurson* views the status of judicial decisions thusly:

> "What emerges from this review is the absence of meaningful judicial limitation on the mail fraud statute. Hundreds of convictions have been affirmed for the handful that have gone awry. Few courts have chosen to grapple with what constitutes a 'scheme to defraud'. The most one can conclude is that, motivated by convictions that seem unfair to begin with, some courts have felt compelled to find that certain facts do not constitute such a scheme. The expansive growth of the statute has proceeded apace." At p. 448.

The importance of resolving these issues is illustrated by the fact that for the fiscal year ending June 30, 1981, some 4,276 defendants were charged with fraud in the federal court, excluding income tax fraud. See Table H 15, p. H-30, "Federal offenders in the United States District Courts" (1981), Administrative Office of U.S. Courts. Statistics published by the Department of Justice show that in fiscal 1981, filings under the mail and wire fraud statutes accounted for 3.8% of the total criminal filings. (See U.S. Attorneys Office, Statistical Report, Fiscal Year 1981, Table 3). The administrative office of the U.S. Courts shows, for the fiscal year ended June 30, 1981, that some 857 defendants were charged with violation of 18 U.S.C. Section 1341. Pp. 116, 118, "United States District Courts

Sentences Imposed Charts", Administrative Office of U.S. Courts.

This Court has recently recognized the problems presented in this case in other contexts. In this term, this Court has granted certiorari to decide (1) the question whether or not, under the anti-fraud provisions of the Federal Securities Laws, fiduciary duties may be imposed upon securities analysts: *Dirks v. Securities & Exchange Commission*, 681 F.2d 824 (D.C. Cir. 1982), *cert. granted*, No. 82-276 (Nov. 15, 1982), and (2) the question of the reach of 18 U.S.C. Section 2113(b) (Federal bank robbery statute), *i.e.*, does it reach fraud by false pretenses and/or does the rule of lenity require a narrower construction so as to prohibit application of the statute where there is no sufficient (at common law) evidence of false pretenses. *Bell v. U.S.*, 678 F.2d 547 (5th Cir. 1982) (en banc), *cert. granted*, Case No. 82-5119, Nov. 29, 1982. Since this case involves the imposition of *criminal* sanctions in the fiduciary setting, this case likewise demands that certiorari be granted. And, in another case involving the construction of the mail fraud statute in the political context, this Court now has before it the case of *Margiotta v. U.S.*, 688 F.2d 108 (2nd Cir. 1982), *petition for certiorari pending*, Case No. 82-1126, filed Jan. 4, 1983. The *Margiotta* case involves somewhat similar issues to the instant case in that, over a strong dissenting opinion, the Second Circuit found that a *federal* fiduciary duty should be imposed upon a political leader for purposes of the mail fraud statute even though state law arguably imposed no such duty.

In short, because this case involves issues of great importance to the criminal justice system, and to settle many questions concerning the application of a federal fiduciary duty in the criminal law context, this Honorable Court should grant certiorari to review Petitioner's conviction.

II.

The decision below is inconsistent with this Court's prior decisions and is in conflict with other Circuits.

A. The decision below holding that there is a federal fiduciary duty is inconsistent with this Court's prior decisions.

The Court of Appeals Decision is in direct conflict with applicable decisions of this Court. The Court has held that there is no federal general common law. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). This Court has also held that there is no federal common law of crimes to be developed by the federal courts. *Parratt v. Taylor,* 451 U.S. 527, 531 (1981). This Court has refused to create federal fiduciary standards under the anti-fraud provisions of Rule 10(b)-5 of the Federal Securities Act. *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462 (1977). The Court in *Santa Fe,* held that:

> "There may well be a need for uniform federal fiduciary standards . . . (b)ut those standards should not be supplied by judicial extension of 10(b) and Rule 10(b)-5 . . . ." *Id.,* at 479-80.

This Court has also held that the mail fraud statute cannot be used to make criminal conduct that is not "in the nature of deceit or fraud as known to the law or generally understood." *Fasulo v. U.S.,* 272 U.S. 620, 629 (1926). This Court has also held that any expansion of the mail fraud statute "must . . . (be) at the initiative of Congress and not of this Court." *U.S. v. Maze,* 414 U.S. 395, 405, n. 10 (1974).

By imposing a federal fiduciary standard upon Petitioner where none was expressly imposed by federal or state law or regulation, the Tenth Circuit's Opinion is thus in conflict with decisions of this Court.

B. The decision of the Tenth Circuit is also in direct conflict with other Circuits which have held that mere constructive fraud, as opposed to actual fraud, cannot constitute a violation of the mail fraud statute.

In *Epstein v. U.S.*, 174 F.2d 754, at p. 765 (6th Cir. 1949), the Court stated as follows:

> "Courts speak of actual or active fraud as contrasted with constructive fraud. Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud. *Goodrich v. Waller*, 324 Mich. 456, 22 N.W.2d 862; *Stern v. National City Co.*, D.C., 25 F.Supp. 948. To constitute actual fraud, there must be such a fraud as affects the conscience. *Lake Hiawatha Park Association v. Agricultural Society*, 28 Ohio App. 289, 162 N.E. 653. Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. *Goodrich v. Waller, supra; Stern v. National City Co., supra.* Constructive fraud may be found merely from the relation of the parties to a transaction or from circumstances and surroundings under which it takes place. *Lake Hiawatha Park Association v. Agricultural Society, supra.* It is said that constructive fraud is a term that means, essentially, nothing more than the receipt and retention of unmerited benefits. *Olitkowski v. Loan Association*, 302 Mich. 303, 4 N.W.2d 664.
>
> "In order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme

> embracing active or actual fraud. A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud. In *Shushan v. U.S.*, 5 Cir., 117 F.2d 110, 115, which was a case concerned with a fraudulent scheme to bribe public officials to secure excessive fees from the state, the court, in holding that this constituted an active fraud, said: 'We agree with appellants that the constructive frauds which equity in civil cases sometimes sets up to do justice will not suffice under this criminal statute; and that there must be a purpose to do wrong which is inconsistent with moral uprightness.' The same rule was emphasized and the foregoing statement adopted by the court in the subsequent case of *Bradford v. U.S.*, 5 Cir. 129 F.2d 274."

The Court in *Epstein* held that a mere nondisclosure of certain facts concerning a conflict of interest cannot constitute actual fraud. This doctrine has been followed in several circuits: In the Eighth Circuit where the Court held in *U.S. v. McNeive*, 536 F.2d 1245, 1250, 1251 (8th Cir. 1976) (the Court held, *inter alia*, not every breach of fiduciary duty makes a criminal fraud; no duty on part of plumbing inspector for city to disclose receipt of "tips" to city; no violation of mail fraud statute where there were no material misrepresentations to city regarding receipt of gratuities); see also *U.S. v. Rabbitt*, 583 F.2d 1014, 1024, 1026 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) (mail fraud convictions of state legislator reversed where, *inter alia*, court found no certain standard of conduct requiring a legislator to disclose interest in certain contracts).

The District of Columbia, the Second and Seventh Circuits, while giving lip-service to the *Epstein* doctrine, have nonetheless effectively rejected constructive fraud as a defense. See, *e.g.*, *U.S. v. Barta*, 635 F.2d 999, 1005 (2nd

Cir. 1980), *cert. denied*, 101 S.Ct. 1703 (1981) (what transforms a mere fiduciary breach into a criminal offense is a violation of a duty to disclose); *U.S. v. George*, 477 F.2d 508, 512 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); *Post v. U.S.*, 407 F.2d 319, 329, n. 59 (DC Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969). The Fifth Circuit in *U.S. v. Ballard*, 663 F.2d 534 (5th Cir. 1981), *modified on reh'g*, 680 F.2d 352 (5th Cir. 1982), citing *Epstein* with approval, reversed mail fraud convictions but held that a breach of fiduciary duty is fraud where detriment is shown, and detriment could consist of duty to disclose material information. The Fourth Circuit in *U.S. v. Mandel*, 591 F.2d 1347 (4th Cir.), *aff'd in relevant part on reh's en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980) held that a failure of public official to disclose material information can constitute a breach of fiduciary duty but is not enough for a mail fraud conviction; there must in addition be some "actionable fraud".

This Honorable Court should grant review of this case to decide the applicability and meaning of the doctrine of constructive fraud as there is a conflict in the circuits on this issue.

C. The decision of the Tenth Circuit conflicts with the decisions of this Court and other Circuits as regards its interpretation of 18 U.S.C. Section 1001, and, by implication, 18 U.S.C. Section 1341.

The false statement charges in Counts 11-14 of the Indictment related to the fact that the placement of Petitioner's pharmacy provider number on the claim forms was a knowing and intentional false representation.

The government is required, where an allegedly false statement is arguably ambiguous, to offer proof negating any reasonable interpretation that would make the state-

ment true. If the defendant has not intended by his statement to assert the proposition which the government has alleged to be false, he cannot ordinarily be said to have knowingly uttered a false statement. *U.S. v. Anderson*, 579 F.2d 455 (8th Cir. 1978), at pp. 459-60; *U.S. v. Diogo*, 320 F.2d 898 (2nd Cir. 1963). In determining whether a statement is made with the knowledge of its falsity, the courts have held that they must look to the meaning intended by the defendant rather than to the interpretation of the statements which the authorities did in fact make, or even to the interpretation which the authorities might reasonably have made. *U.S. v. Diogo, supra*, 320 F.2d 905-906.

In the instant case, the government to prove its false statement charges elicited from one of its witnesses that the intent of the form as to the space provided for the "provider number" was the place where the prescriptions were filled and thus Petitioner's claim forms were false but produced no evidence as to what Petitioner or his employees intended. All of Petitioner's evidence was to the effect that the entries were made to show that Petitioner's pharmacy was the provider submitting the claim. Neither the form itself, nor federal or state law or regulations stated what the forms should state. The government thus failed to meet its burden under the cases. The Tenth Circuit overlooked this point.

This Court has held, in a perjury prosecution under 18 U.S.C. Section 1621, that an unresponsive answer which, though, literally true on its face, was untrue by negative implication could not serve as a predicate for a perjury conviction under the statute. *U.S. v. Bronston*, 409 U.S. 352 (1972). Several courts have relied on *Bronston* to hold that there was insufficient evidence in 18 U.S.C. Section 1001 prosecutions. *U.S. v. Clifford*, 426 F.Supp. 696 (EDNY 1976); *U.S. v. Vesaas*, 586 F.2d 101 (8th Cir. 1978); *U.S.*

v. Anderson, op. cit.; U.S. v. Race, 632 F.2d 1114 (4th Cir. 1980).

This Court should also, as a restriction upon the reach of 18 U.S.C. Section 1341, apply this same body of law that has developed under 18 U.S.C. Section 1001 to the instant mail fraud offenses in circumstances such as the instant case where prosecutions under 18 U.S.C. Section 1341 are bottomed upon allegedly false statements. To so construe the statute would permit the mail fraud statute to be applied to a defendant within the confines of due process of law and fair notice as required under the Fifth and Sixth Amendments to the United States Constitution.

III.

The decision below is in conflict with the Fifth and Sixth Amendment rights to fair notice and warning, with prior decisions of this Court, and with the decision of at least one other Circuit.

This Court has held that crimes which are punishable by statute must be definitely defined. *Aptheker v. Secretary,* 378 U.S. 500 (1964). A person acting within the scope of the law must have fair warning of the proscribed conduct. *Rowan v. U.S. Post Office,* 397 U.S. 728 (1970). Crimes cannot be created by inference nor can they be constructed *nunc pro tunc. U.S. v. Laub,* 385 U.S. 475 (1966). An act which was not proscribed by statute both at the time of the offense and at the time of the prosecution cannot be prosecuted. *Bouie v. Columbia,* 378 U.S. 347 (1964).

As one author has noted in the context of the mail fraud statute:

> "Invocation of fiduciary fraud to justify Section 1341 conviction violates not only substantive due process

(since it equates moral notions of 'disloyalty', 'faithlessness', and 'subordination of the interest of another towards whom one has a duty in the pursuit of one's own interest' with *criminal* conduct) but also procedural due process. The Sixth Amendment requires that criminal offenses be precisely defined to provide reasonable forewarning of what acts are criminal and what are not. Furthermore, to prevent arbitrary and discriminatory enforcement, the laws must provide explicit standards for those who apply them.

"The courts, however, have deliberately left the meaning 'scheme to defraud' so vague and all-encompassing that any deceptive conduct in which there has been an incidental mailing fits this procrustean statute." (Footnotes omitted) *Morano, op. cit.*, pp. 77-78.

This Court has also held that, where there is an ambiguity concerning the ambit of a criminal statute, any such ambiguity should be resolved in favor of lenity. See, *U.S. v. Bass*, 404 U.S. 336 (1971); *Williams v. U.S.*, 458 U.S. ..... (1982) (check not a false statement under 18 U.S.C. Section 1014; Rule of Lenity requires reversal of conviction where the scope of the statute is ambiguous; this Court rejected interpretation of the statute which "would make a surprisingly broad range of unremarkable conduct a violation of federal law."). Certainly, there was ambiguity in the instant case as to whether or not there was a fiduciary duty to disclose and whether there was, in fact, a scheme to defraud.

The situation in this case is quite similar to that in *U.S. v. Porter*, 591 F.2d 1048 (5th Cir. 1979). Both cases involve payments for Medicaid services under plans allowing for variable reimbursement rates to providers and the government charged in both cases that by a scheme to defraud and through the use of false statements, the de-

fendants obtained higher reimbursements than they were entitled to receive. In both cases, the government contended that the defendants were placed on notice of their wrongful conduct through non-statutory and non-regulatory methods. When the *Porter* court directed the government to produce a statute or a regulation prohibiting defendants' conduct, the government failed to do so. This failure was fatal to the government's charges. As explained by the Court (at pp. 1057-1058):

> "The response failed to identify any statute or regulation which prohibited physicians from receiving handling fees from the labs. Instead, the government asserted that '(d)uring the time period covered by the indictment, the Medicare carrier provided that charges for the drawing or handling of blood should be submitted by a physician to the carrier as a separate charge. . . .' The two exhibits cited by the government are a March, 1974 Blue Shield publication entitled 'Medicare Notes', which outlined the procedure to be followed when doctors bill Medicare for lab tests, and an August 27, 1979 letter from Blue Shield on the same subject. Neither letter prohibited doctors from receiving payments from labs, and, even if there had been some proof at trial that these defendants had received and read these documents, and there was no such proof, we do not think that mere letters from Blue Shield could form the basis for a criminal prosecution. In short, no statute or regulation formed the basis for the allegation in paragraph 10 of the indictment.
>
> "We must hold that the indictment failed to charge a conspiracy to defraud the United States and that the government failed to prove any such conspiracy at trial." (Footnote omitted)

* * *

The Mail Fraud Counts

"It necessarily follows that Counts 2 through 67 of the indictment failed to charge the defendants with mail fraud in violation of 18 U.S.C. Section 1341. That statute prohibits the use of the mails for the purpose of executing any scheme or artifice to defraud, and the indictment charged that the defendants 'did knowingly, wilfully and unlawfully devise and intend to devise a scheme and artifice to defraud the United States . . . of its right to have its Medicare programs for providing health insurance to the aged . . . conducted honestly, fairly, impartially, and free from deceit, craft, trickery, corruption, dishonesty, fraud and kickbacks . . . .' No other scheme to defraud was charged and proved, and there are no persuasive reasons for analyzing a crime of defrauding the United States in a different manner under Section 1341 than we have previously done under Section 371. Therefore, the mail fraud convictions of the appellants are reversed."

The same situation exists in Petitioner's case. No statute or regulation prohibited the defendants from using Petitioner's pharmacy's provider number to bill for Medicaid prescriptions filled at the clinic pharmacy. While it may be that this was not the way SRS intended its system to work, uncodified ideas of state officials, like the "Medicare Notes" mentioned in *Porter*, cannot constitute the type of notice of unlawful conduct required for a criminal prosecution.

This conclusion applies by implication to the false statement charges alleged in Counts 11-14 of the Information: that placing Petitioner's pharmacy's provider number in the space on the form labeled "pharmacy number" (ROA, Vol. 2, Exhibits 11-14) constituted a false state-

ment because it misrepresented that the prescriptions set forth on the form were filled at Petitioner's pharmacy rather than at the Central Clinic.

There is presumed in this false statement charge a requirement that the space on the form labeled "pharmacy number" identified the number of the pharmacy where the prescription is *filled,* rather than the number of the pharmacy submitting the claim. As stated *supra,* no such requirement existed in any federal or state statute or regulation, including KAR 30-5-21 or 30-5-26, *supra.* Without such a requirement, the form itself becomes the only point of reference to what is meant by "pharmacy number" and the form is silent on the point. Since the "pharmacy number" placed on the form was Petitioner's pharmacy's, there is no fraudulent statement because there was nothing to instruct or warn a user of the form that the "pharmacy number" must be the provider number of the pharmacy where the prescription is filled, not the provider number of the pharmacy submitting the claim.

In this situation, the mere existence of 18 U.S.C. Sections 1001 and 1341 was not sufficient to warn the Petitioner. Since the requirements relied upon by the government[9] did not exist as a matter of undisputed fact, then as a matter of law the mail fraud statute did not afford Petitioner a constitutionally-adequate warning of prohibited conduct. For similar reasons, as a matter of law the allegations contained in both the mail fraud and false statement counts of the Information fail to state an offense. As stated by the Court in *Porter* (at p. 1053):

> ". . . If there is a fair doubt as to whether a defendant's conduct is embraced in the prohibition, the policy of lenity requires that the doubt be resolved in favor of

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9. See footnote 5, *supra.*

the accused. *Ladner v. U.S.*, 358 U.S. 169, 178, 79 S.Ct. 209, 3 L.Ed.2d 199 (1958)."

To like effect, see *Hammer v. U.S.*, 134 F.2d 592 (5th Cir. 1943). The Tenth Circuit, also, in *U.S. v. Alvarez*, a case with similar facts to the instant case, in an opinion "not for routine publication", reversed Medicare/Medicaid fraud charges, citing *U.S. v. Porter*, Case Nos. 79-1806, 79-1807, March 3, 1981, *pet. for reh'g denied*, Jan. 18, 1983. The same panel which decided the instant case decided *Alvarez*.

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

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(April , 1983)

APPENDIX

APPENDIX A

[Editor's Note: The opinion of the United States Court of Appeals, Tenth Circuit in *United States v. Goldstein* published at this citation, 649 F.2d 799-808 was withdrawn from bound volume because rehearing is pending.]

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lawrence GOLDSTEIN, Richard I. Silberg, and Frank J. Jones,
Defendants-Appellants.

Nos. 79-1769 to 79-1771.

United States Court of Appeals,
Tenth Circuit.

Argued and Submitted Nov. 17, 1980.
Decided May 22, 1981.

Defendants were convicted in the United States District Court for the District of Kansas, Earl E. O'Connor, J., of mail fraud, of making false statements and of unauthorized distribution and possession of controlled substances and they appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) dispensing of controlled substances by registered practitioners for valid medical reasons did not constitute unauthorized distribution and possession of controlled substances, even though the controlled substances were dispensed from an unregistered location; (2) evidence sustained conviction for mail fraud; and (3) with respect to charge that defendant had made false statement

as to matter within jurisdiction of department or agency of United States, trial court properly decided as matter of law the issue of whether the false statements were made in matter within jurisdiction of United States.

Affirmed in part and reversed in part.

1. Criminal Law (Key) 1169.1(2)

In prosecution based on scheme to defraud state and United States by making false claims for payments for drugs under state medicaid program, wherein Government began by describing fraudulent scheme as intent by defendants to recover higher reimbursement fees than those to which they were entitled, no prejudicial error was committed when, in response to defendants' claim made at trial that place where goods were dispensed was not a pharmacy under state law, Government was allowed to offer evidence to show that defendants were entitled to no reimbursement at all for prescriptions not filled at licensed pharmacy. 18 U.S.C.A. §§ 1001, 1341.

2. Drugs and Narcotics (Key) 73

Only drug transactions occurring outside legitimate distribution channels may be prosecuted under statute prescribing unauthorized distribution and possession of controlled substances. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

3. Drugs and Narcotics (Key) 73

Dispensing of controlled substances by registered practitioners for valid medical reasons did not constitute unauthorized distribution and possession of controlled substances, even though the controlled substances were dispensed from an unregistered location. Comprehensive Drug Abuse Prevention and Control Act of 1970. § 401 (a)(1), 21 U.S.C.A. § 841(a)(1).

4. Post Office (Key) 35

Application of mail fraud statute was not improper on theory that, since the fraud involved violation of state statute, the province of the state was invaded. 18 U.S.C.A. § 1341.

5. Post Office (Key) 49(11)

Evidence sustained conviction for mail fraud by mailing medicaid drug reimbursement claim that deliberately misstated the facts, or aided and abetted in such misstatement, in order to receive medicaid reimbursement at rate higher than permitted by regulations. 18 U.S.C.A. § 1341.

6. Criminal Law (Key) 738

Where intent is element of crime charged, issue is strictly one for jury which must determine whether defendant knew his conduct was illegal and must weigh evidence and draw reasonable inferences therefrom in making its judgment, and in so doing, determination of credibility is jury's function.

7. Criminal Law (Key) 1144.13(2)

Appellate court must view evidence and all its reasonable inferences most favorably to verdict in determining whether substantial evidence supports it.

8. Fraud (Key) 69(6)

With respect to charge that defendant had made false statement as to matter within jurisdiction of department or agency of United States, trial court properly decided as matter of law the issue of whether the false statements were made in matter within jurisdiction of United States. 18 U.S.C.A. §§ 2, 1001.

Monti L. Belot of Weeks, Thomas, Lysaught & Mustain, Chartered, Kansas City, Kan., for defendant-appellant Lawrence Goldstein.

Thomas A. Hamill of Hamill, Lentz, Neill & Dwyer, Shawnee Mission, Kan., for defendant-appellant Richard I. Silberg.

Michael Lerner of Barnett & Lerner, Chartered, Kansas City, Kan., for defendant-appellant Frank J. Jones.

John Oliver Martin, Asst. U. S. Atty., Kansas City, Kan. (James P. Buchele, U. S. Atty., Kansas City, Kan., with him, on brief), for plaintiff-appellee.

Before SETH, Chief Judge, and BARRETT, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

These companion appeals arise from the convictions of defendants Lawrence Goldstein, Richard Silberg and Frank Jones on ten counts of mail fraud in violation of 18 U.S.C. §§ 2, 1341, and four counts of making false statements in violation of 18 U.S.C. §§ 2, 1001. In addition, defendants were convicted of one count of unauthorized distribution and possession of controlled substances in violation of 21 U.S.C. § 841(a)(1). We affirm in part and reverse in part.

Defendants were charged with devising a scheme to defraud the the state of Kansas and the United States by making false claims for payments under the Kansas medicaid program. Defendants were also charged with distributing drugs from a pharmacy not registered as required by the United States Drug Enforcement Administration (DEA). The alleged fraudulent scheme involved the clinic of Dr. Jones, an osteopathic physician. Goldstein, a pharmacist registered with the DEA and the state of Kansas, owned the Morrow & Keeling pharmacy, which

was also registered in compliance with federal and state law. Morrow & Keeling was located several blocks from Jones' clinic. Silberg, a registered pharmacist, was employed by Goldstein as the manager of Morrow & Keeling.

The Morrow & Keeling pharmacy was a participant in the Kansas medicaid program. Pursuant to the relevant Kansas regulations, reimbursement under the program was provided only for drugs prescribed by the recipient's attending physician and dispensed in a licensed pharmacy by a licensed pharmacist. Providers of pharmaceutical items under the medicaid program were reimbursed by the state according to a payment formula based on each individual pharmacy's operating costs. Each pharmacy was required to submit yearly data from which the state determined the appropriate fee. Doctors who themselves filled prescriptions could not be reimbursed under the program for the drugs they provided except under circumstances not relevant here.

Dr. Jones operated the Riverside Clinic in Kansas City, Missouri, and the Central Clinic in Kansas City, Kansas. We are concerned here with the operation of the Central Clinic. During the relevant time, the Riverside Clinic was registered to possess controlled substances pursuant to federal and state law; the Central Clinic was not so registered. Dr. Jones himself was registered to prescribe controlled substances. Shipments of controlled drugs were received at the Riverside Clinic and transferred as needed to the Central Clinic.

In the fall of 1975, Goldberg and Dr. Jones reached an agreement under which Morrow & Keeling maintained a stock of drugs at the Central Clinic. Dr. Jones himself filled prescriptions for medicaid recipients from this stock. However, Morrow & Keeling submitted the claims for medicaid reimbursement for these drugs using its own

provider number. Dr. Jones received a dispensing fee of 25¢ for every prescription that was processed this way. The fee was later raised to 50¢.

In March of 1977, Gilbert Emick, a registered pharmacist employed by Morrow & Keeling, began to work at the Central Clinic two days a week, filling prescriptions from the Morrow & Keeling stock at the clinic and submitting medicaid claims on the Morrow & Keeling number. These claims were authorized by Silberg, the manager of Morrow & Keeling, who also prepared the yearly pharmacy cost studies that the state required each pharmacy claiming medicaid reimbursement to submit. Silberg received a monthly salary plus 50% of the gross profits of the store. In 1975 Medicaid reimbursed Morrow & Keeling $31,862, which represented payment for 5,706 claims. Medicaid paid Morrow & Keeling $189,319 for 31,231 claims in 1976, $282,375 for 44,406 claims in 1977, and $282,058 for 39,435 claims in 1978. During this period Dr. Jones received a total of approximately $27,195 in payments from Morrow & Keeling, representing some 60,000 prescriptions.

[1] The essence of the fraudulent scheme charged by the Government in the section 1341[1] counts is that

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1. The mail fraud statute provides in pertinent part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1341.

by using the Morrow & Keeling provider number in submitting claims for prescriptions actually filled at the Central Clinic, defendants were able to receive reimbursements higher than those to which they were entitled, or reimbursements for prescriptions excluded entirely from medicaid coverage.[2] Each of the three defendants allegedly agreed to the scheme, aided in its success, and benefitted financially from it. The charges of making false statements in violation of 18 U.S.C. § 1001[3] resulted from defendants' use of the Morrow & Keeling provider number, name, and address in the pharmaceutical claim forms submitted for the Central Clinic prescriptions. The alleged violations of 21 U.S.C. § 841(a)(1)[4] rest on the fact that the Central Clinic was not registered with the DEA to possess or dispense controlled drugs.

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2. We note defendant Silberg's argument that prejudicial error occurred when the Government presented an alternative theory of fraud during the course of the trial. The Government began by describing the fraudulent scheme as the intent by defendants to recover higher reimbursement fees than those to which they were entitled. In response to defendants' position at trial that the Central Clinic was not a pharmacy under Kansas law, the Government offered evidence to show that the defendants were entitled to no reimbursements at all for prescriptions not filled at a licensed pharmacy. We find no prejudicial error in allowing the Government to counter a defense expressly raised by defendants, who can hardly claim surprise.

3. 18 U.S.C. § 1001 provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

4. 21 U.S.C. § 841(a)(1) provides:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

We affirm defendants' convictions on the counts alleging violations of 18 U.S.C. §§ 2, 1001, and 1341. However, we reverse their convictions on the count alleging violations of 21 U.S.C. § 841(a)(1) and remand with directions to dismiss that count.

I.

The Section 841(a)(1) Count

Defendants Goldstein, Jones, and Silberg were all properly registered with the DEA to dispense controlled substances. The Government made no allegation in the indictment and presented no evidence at trial that the prescriptions written by Dr. Jones and filled at the Central Clinic were not prescribed for legitimate medical purposes in the usual course of professional treatment. Indeed, the evidence showed that the drugs were properly dispensed as part of Dr. Jones' professional practice. However, the Central Clinic itself was not registered with the DEA as a location to maintain controlled substances until April 1978. Thus, the issue before us is whether the dispensing of controlled substances by registered practitioners for valid medical reasons is a violation of 21 U.S.C. § 841(a)(1) when the controlled substances are dispensed from an unregistered location.

Defendants contend that their conduct does not constitute an offense under section 841(a)(1) because the legislative intent behind the enactment of that section was to subject to prosecution only those persons, registered and unregistered, who traffic in or "push" controlled substances by dispensing them for profit rather than in the usual course of professional practice. They argue that registered practitioners are not covered by section 841 unless they divert drugs from legitimate medical purposes.

The Government responds that the purpose of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, is to maintain complete control over all drug transfers by providing for a closed system of legitimate drug distribution. An essential element of this closed system is registration. The Government essentially contends that if any link in the transfer of a controlled substance is not properly registered, the transfer is not authorized and therefore violates section 841(a)(1).

Section 841(a)(1) provides: "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." Authorized activities are defined by 21 U.S.C. § 822(b) as follows:

> "Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter."

We can find no case in which these provisions have been construed in the precise factual setting presented by this appeal. Numerous decisions of this and other circuits have held that a physician or pharmacist who is registered and who dispenses controlled substances in the usual course of professional conduct is immune from prosecution under section 841(a)(1). *See, e. g., United States v. Seelig*, 622 F.2d 207, 213 (6th Cir. 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 206, 66 L.Ed.2d 89 (1981), ("[R]egistered doctors (or other practitioners) are exempt from criminal liability under § 841(a)(1) unless

they were acting outside the usual course of professional practice."); *United States v. Smurthwaite*, 590 F.2d 889, 891 (10th Cir. 1979); *United States v. Kirk*, 584 F.2d 773, 784 (6th Cir.), *cert. denied*, 439 U.S. 1048, 99 S.Ct. 726, 58 L.Ed.2d 708 (1978); *United States v. Black*, 512 F.2d 864, 868 (9th Cir. 1975); *United States v. Bartee*, 479 F.2d 484, 487 (10th Cir. 1973). This immunity has been inferred either from 21 U.S.C. § 822(b) or from a joint reading of 21 U.S.C. §§ 829(a), (b)[5] and 21 C.F.R. § 306.04 (a) (1973) (redesignated as 21 C.F.R. § 1306.04(a) (1973)).[6]

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5. 21 U.S.C. § 829 in relevant part provides:

"(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 353(b) of this title. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

"(b) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 353(b) of this title. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner."

6. This regulation provides in pertinent part:

"A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and au-

(Continued on following page)

Although the courts have consistently limited prosecution of registered practitioners under section 841(a)(1) to those acting outside the scope of legitimate medical practice, the Government argues that these cases are not controlling here because they do not involve dispensing drugs from an unregistered pharmacy. This distinction is not persuasive in view of the significant observations made by the Supreme Court in *United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975). There the Court held that registered physicians can be prosecuted under section 841 when their activities fall outside the usual course of professional practice, reversing the court of appeals decision that a physician is exempted from prosecution by virtue of his status as a registrant. But in so holding, the Court emphasized that "Congress was concerned with the nature of the drug transaction, rather than with the status of the defendant." *Id.* at 134, 96 S.Ct. at 341. In fact, the Report of the Senate Judiciary Committee on an earlier controlled substances act had described the counterpart of § 841 as applying to "traffickers." *See id.* The Court also pointed out that

> "the penalty to be imposed for a violation was intended to turn on whether the 'transaction' falls within or without legitimate channels. All persons who engage in legitimate transactions must be registered and are subject to penalties under §§ 842 and 843 for '[m]ore or less technical violations.' HR Rep. No. 91-1444, p. 10. But 'severe criminal penalties' were imposed on those, like respondent, who sold

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Footnote continued—

thorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances."

drugs, not for legitimate purposes, but 'primarily for the profits to be derived therefrom.'"

Id. at 135, 96 S.Ct. at 342.

[2, 3] We find this language a clear indication that only those drug transactions occurring outside legitimate distribution channels may be prosecuted under section 841(a)(1). Accordingly, we hold that the transfers here were not subject to the sanctions of that section. Whether the defendants could have been properly charged under another section of the Controlled Substances Act is not before us. The convictions of defendants for violating 21 U.S.C. § 841(a)(1) are reversed.

II.

The Mail Fraud Counts

[4] Defendants contend that applying the mail fraud statute, 18 U.S.C. § 1341, to the facts of this case was constitutionally invalid because defendants did not have fair warning that their conduct was criminal.[7] They correctly concede that a fraudulent scheme charged under section 1341 need not violate state law. *See, e. g., United States v. Mandel,* 591 F.2d 1347, 1361 (4th Cir. 1979), *cert. denied,* 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980), and cases cited therein. Nonetheless, they argue that where, as here, the fraudulent scheme arises out of an activity regulated by the state, the relevant state law

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7. We reject defendant Silberg's argument that applying the mail fraud statute was improper because it invaded the province of the state. "Even if the substance of the scheme to defraud involves matters normally within the purview of state control or regulation, once the mails are utilized to effectuate the scheme, the federal government has the right to prosecute the schemer under the mail fraud statute." *United States v. Mandel,* 591 F.2d 1347, 1358 (4th Cir. 1979), *cert. denied,* 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980).

and regulations must be shown to provide adequate notice of prohibited conduct. They contend that the relevant state regulations governing medicaid payments for pharmaceutical items did not require the Central Clinic operation to have its own provider number, nor did they prohibit Morrow & Keeling from submitting claims for drugs dispensed at the Central Clinic under the Morrow & Keeling provider number.

We begin by noting that defendants were charged with the crime of mail fraud, not with violating the Kansas medicaid program. The essence of an offense under section 1341 is use of the mails to execute a fraudulent scheme. *See United States v. Allen*, 554 F.2d 398, 408 (10th Cir.), *cert. denied*, 434 U.S. 836, 98 S.Ct. 124, 54 L.Ed.2d 97 (1977). In determining whether conduct is to be considered a scheme to defraud we have stated that "fraudulent representations, as the term is used in 18 U.S.C.A. § 1341, may be effected by deceitful statements of half-truths or the concealment of material facts and [that] the devising of a scheme for obtaining money or property by such statements or concealments is within the prohibition of the statute." *Id.* at 410. The Kansas medicaid laws and regulations are relevant to the frauds charged only insofar as they establish adequate guidelines under which defendants should have known what material facts they had a duty to disclose in claiming medicaid reimbursements.

Under Kansas law "the term 'pharmacy' means and includes every drugstore or shop or other place where (1) drugs are dispensed or sold at retail . . . ." Kan.Stat. § 65-1626(e). Webster's Third New International Dictionary (1976) defines "retail" as "the sale of commodities or goods in small quantities to ultimate consumers." Thus, it appears that the Central Clinic operation was a

pharmacy under Kansas law. It is illegal to operate, maintain, open, or establish any pharmacy in Kansas without first obtaining a permit from the state board of pharmacy. Kan.Stat. § 65-1643(a). Furthermore, in 1975, a Kansas regulation was adopted providing that "[n]o pharmacy nor pharmacist shall have, participate in, or permit an arrangement, branch, connection or affiliation whereby prescriptions are solicited, accepted, collected, or picked up . . . from or at any location other than a pharmacy for which a registration in good standing has been issued by the board." Kansas Administrative Regulations (K.A.R.) 68-2-16.

Under the Kansas medicaid regulations in effect during the relevant periods in this case, pharmaceutical goods eligible for state reimbursement were limited to drugs dispensed in a *licensed pharmacy*. *See* K.A.R. 30-5-21. A physician dispensing pharmaceutcials could *not* be reimbursed for such drugs unless he practiced in an area that did not have a licensed pharmacy. *Id.* This exception does not apply here. The fees paid to pharmacies for medicaid prescriptions were "based upon the individual pharmacy's operating cost determined by data submitted by the pharmacy plus a reasonable profit, subject to the department's budgetary limitations." K.A.R. 30-5-26.

The above cited statutes and regulations plainly specified that medicaid claims could be submitted only for prescriptions dispensed by a registered pharmacy. Those dispensed by a physician under the present circumstances were not eligible. The program created a duty in those submitting medicaid claims to disclose the facts relevant to a determination of eligibility, such as whether the prescriptions were filled at a licensed pharmacy by a licensed pharmacist.

We do not find persuasive defendants' argument that the pertinent Kansas regulations did not require the clinic pharmacy to have its own provider number. The Kansas medicaid program was designed to reimburse each "individual pharmacy" with a dispensing fee corresponding to the cost incurred by that pharmacy to fill each prescription. The fee determination was based on such operating expenses as real estate taxes, rental, repairs, insurance, and utilities fees. The medicaid program anticipated that each separate physical location was to receive a fee based on its own individual operating expenses. Thus defendants had a corresponding duty to disclose operating expenses for each individual location where medicaid prescriptions were dispensed. Even assuming arguendo that the regulations could be construed to permit a dispensing fee based on the combined operating costs of the Central Clinic and the Morrow & Keeling pharmacy, defendants would nonetheless have had a duty to disclose those operating costs resulting from the dispensing of medicaid prescriptions at the Central Clinic.

In summary, the Kansas medicaid program required participants to disclose whether the prescriptions were filled at a licensed pharmacy, whether they were filled by a licensed pharmacist, and what operating expenses were incurred at the physical location from which the drugs were dispensed.[8] If defendants failed to disclose those material facts intending thereby to aid the execution of a fraudulent scheme, their conduct clearly falls within section 1341.

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8. Accordingly, we find this case factually distinguishable from *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979). In *Porter* the court found that no materially false statements were filed concerning the claims made. *See id.* at 1055, 1057 n.7. The regulations simply did not impose a duty to disclose the information allegedly forming the basis of the fraudulent scheme. Here, to the contrary, the Kansas regulations did impose the duties to disclose set out above.

[5-7] We therefore turn to defendants' argument that the evidence of intent to defraud was insufficient to support their convictions. Where intent is an element of the crime charged, the issue is particularly one for the jury. It is the jury's province to determine whether a defendant knew his conduct was an illegal act, and its duty to weigh evidence and draw reasonable inferences therefrom in making its judgment. In so doing, the determination of credibility is the jury's function. *United States v. Dennett*, 551 F.2d 261, 262 (10th Cir. 1977); *United States v. Downen*, 496 F.2d 314, 319 (10th Cir.), *cert. denied*, 419 U.S. 897, 95 S.Ct. 177, 42 L.Ed.2d 142 (1974). The appellate court must view the evidence and all its reasonable inferences most favorably to the verdict in determining whether substantial evidence supports it. *United States v. Brinklow*, 560 F.2d 1008, 1009 (10th Cir. 1977); *Downen*, 496 F.2d at 318.

The evidence that substantially supports the jury's conclusion may be summarized as follows. It is undisputed that the Central Clinic was not licensed as required by state and federal law. The existence of the clinic was not revealed in the cost studies submitted by Morrow & Keeling, even though a large percentage of the prescriptions for which it submitted claims were filled there. The payments made by Morrow & Keeling to Dr. Jones were likewise not set out in the cost studies.[9] For many months, Dr. Jones filled the prescriptions himself knowing he could not have been reimbursed for them had he applied directly, because he did not have a provider number for dispensing drugs. Thus, he agreed with Goldstein and Silberg to seek reimbursement through Morrow &

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9. Silberg testified that when he filled out the cost studies he worked in the payments made to Dr. Jones "[a] little here and a little there." Rec. vol. 7, at 588, and that the payments were never set out and identified as such. *See id.* at 586-89.

Keeling. From this evidence the jury could reasonably infer that defendants deliberately misstated the facts, or aided and abetted in such misstatement,[10] thereby concealing the existence of the Central Clinic operation from the Kansas medciaid authorities.

The record contains evidence that the Morrow & Keeling pharmacy received the maximum fee for each prescription allowed to medicaid providers in fiscal 1976 and 1977: $2.25 and $2.35 respectively. A medicaid provider who failed to submit the operating cost study used to determine the fee could only receive reimbursement based on the lowest filed fee for all pharmacies submitting a cost report. This fee was $1.29 for fiscal 1976 and $1.30 for fiscal 1977. A new pharmacy with less than six months of operating costs would receive a fee based on the state-wide average. In fiscal 1976 this fee was $1.85, and in fiscal 1977 it was $2.00. Furthermore, there were facts presented from which the jury

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10. The jury was instructed under 18 U.S.C. § 2 that "[w]hoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Rec., vol. IX, at 893. We believe this instruction was particularly pertinent to Dr. Jones because he did not submit any medicaid claims for drug reimbursement directly to the state of Kansas. In *United States v. Taylor*, 612 F.2d 1272, 1276 (10th Cir.), *cert. denied* 444 U.S. 1092, 100 S.Ct. 1060, 62 L.Ed.2d 782 (1980), we recently said:

> "To be guilty of aiding and abetting, the defendant must be found to have willfully associated himself in some positive way with the criminal venture by showing that he has joined the enterprise as something he wishes to bring about and by seeking to make it succeed by some action on his part. . . . However, 'evidence of an act of relatively slight moment may warrant a jury's finding participation.' *United States v. Garguilo*, 310 F.2d 249 (2d Cir. 1962). It is necessary only that the defendant knowingly associate himself in some way with the criminal venture in order to be an aider and abetter. *Nye & Nissen v. United States*, 336 U.S. 613, 69 S.Ct. 766, 93 L.Ed. 919 (1949)."

It is for the jury to evaluate the evidence and to determine whether a particular defendant willingly aided the commission of a crime. *See* id. at 1276.

could have concluded that the operating expenses of the Morrow & Keeling pharmacy were higher than those resulting from the filling of prescriptions at the Central Clinic, and that a dispensing fee based only on the operating costs of the Central Clinic would have been lower than the fee assigned to Morrow & Keeling. From this evidence the jury could reasonably have inferred that defendants deliberately misstated the facts in their medicaid claims in order to receive medicaid reimbursement at a rate higher than permitted by the regulations. "Intent may be inferred from conduct and circumstantial evidence, upon which reasonable inferences may be based." *United States v. Curtis*, 537 F.2d 1091, 1097 (10th Cir.), *cert. denied*, 429 U.S. 962, 97 S.Ct. 389, 50 L.Ed.2d 330 (1976).

The jury was properly instructed that an honest, good faith belief that the conduct was lawful and legitimate is a complete defense to the charge of mail fraud. It was also instructed that a defendant who in good faith relies on the advice of his attorney after a full and accurate disclosure does not act with the intent necessary to commit mail fraud. Defendants presented these defense theories vigorously, but the jury rejected them. It is the jury's duty to assess credibility and to determine the weight to be given any testimony. *Downen*, 496 F.2d at 319. We have carefully reviewed the record, and we conclude that substantial evidence supports the verdict.

III.

The False Statements Counts

Defendants were convicted on four counts of violating 18 U.S.C. §§ 2, 1001 by making a false statement, or by aiding and abetting such crime, in a matter within the jurisdiction of a department or agency of the United States. The Government contends that defendants vio-

lated the statute by putting the Morrow & Keeling provider number, name, and address on the pharmaceutical claim forms submitted for Central Clinic prescriptions. We reject defendants' claim that they lacked the intent to commit the crime for the same reasons we sustained the jury verdict on the mail fraud counts. Their argument that there was insufficient evidence to show the location where the prescriptions were filled similarly lacks merit.

[8] Defendants contend, in addition, that the false statements were not made in a matter within the jurisdiction of the United States. However, this court has held that where the federal government reimburses a non-federal agency and false statements are made on an application for benefits under such a program, the jurisdictional element of section 1001 is satisfied. *See United States v. Wolf*, 645 F.2d 23, 24-25 (10th Cir. 1981); *United States v. Radetsky*, 535 F.2d 556, 567-68 (10th Cir.), *cert. denied*, 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976) (prosecution under 18 U.S.C. § 1001 proper in case of medicaid fraud). We also reject defendants' argument that the trial court improperly decided this issue as a matter of law. Whether a statement established by the evidence is within the jurisdiction of an agency or department of the United States is a question of law to be decided by the court. *Gonzales v. United States*, 286 F.2d 118, 123 (10th Cir. 1960). Accordingly, the convictions on the false statement counts are affirmed.

We have carefully considered defendants' remaining contention that prosecutorial misconduct in closing argument created prejudice requiring a new trial. Our review of the record reveals this claim to be without merit.

Defendants' convictions under 21 U.S.C. § 841(a)(1) are reversed. The convictions on the counts charging violations of 18 U.S.C. §§ 2, 1341, and 1001 are affirmed.

APPENDIX B

U.S. Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

U.S. Constitution

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX D

Mail Fraud Statute

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX E

False Statement Statute

18 U.S.C. § 1001.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

APPENDIX F

K.A.R. 30-5-21 provides:

"Scope of pharmaceutical goods and services. The scope of medical services provided to the categorically needy (including recipients of general assistance) and the medically needy shall include pharmaceuticals as described below:

A. The recipient shall be entitled to legend drugs or medications, except certain ineffective or possibly effective drugs which at the discretion of the state agency have been denied reimbursement under the program and which are prescribed by his attending physician or dentist or doctor of dental surgery and which are dispensed in a licensed pharmacy by a licensed pharmacist and which have been accepted for inclusion on any formulary or drug listing which might be adopted and distributed by the agency to eligible providers of service, subject to the limitations of 30-5-19H. The recipient shall be entitled to the medication or devices outlined in 30-5-20J when ordered by the attending physician. Reimbursement shall be made to the pharmacy only when the material is prescribed by the attending physician. The recipient shall be required to pay the first fifty cents ($.50) of reimbursement due the pharmacy for each prescription, new and refill, eligible for payment by the state agency. The co-pay fee requirement shall not be imposed on all charges for services as exempted by the provisions of Section 1905(a), clauses 1,2,3,4, 5 and 7 as made applicable by the provisions of 45 CFR 249.40; the aforesaid federal statutory and regulatory provisions, as stated on July 1, 1976, being

herein adopted by reference. Selected nonlegend drugs, devices and supplies will be payable when prescribed by a physician and dispensed by a pharmacist for the disease entities and conditions listed below. All other nonlegend drugs are excluded from payment.

1. Asthma and emphysema
2. Acute or subacute bronchitis and rhinitis
3. Pregnancy
4. Vitamin deficiencies
5. Digestive deficiencies
6. Anemia
7. Dermatologic Conditions
8. Allergic Conditions
9. Vasodilators
10. Administrative devices
11. Diabetes
12. Stomach ulcers
13. Arthritis
14. Family planning medications and devices

1. In areas which do not have a licensed pharmacy, a physician dispensing pharmaceuticals will be paid for such drugs and medications after a drug dispensing permit has been issued by the state department of social and rehabilitation services. Such payment does not apply to injectable materials except as included in the charge for the professional services of the physician."

K.A.R. 30-5-26 provides:

"Fees for pharmaceutical items. Pharmacies shall be paid on the basis of acquisition cost of materials plus a professional fee. The fees paid to pharmacies shall be based upon the individual pharmacy's operating cost determined by data submitted by the pharmacy plus a reasonable profit, subject to the department's budgetary limitations. Acquisition cost is defined as the allowable price determined by the state for each covered drug in accordance with federal regulations.

"The effective date for change of professional fees shall be July 1 of each year based upon studies of costs for the previous calendar year. Failure or refusal by a Kansas pharmacy, or when required of out-of-state pharmacies to file cost reports will result in the assignment to the pharmacy of a professional fee equal to the lowest professional fee filed by any Kansas pharmacy.

"Occasional out-of-state pharmacies will be reimbursed on the basis of cost plus the average professional fee of Kansas pharmacies. Once the annual volume of payments to out-of-state pharmacies reaches a substantial level, the filing of cost schedules will be required.

"The above payment formula will apply to eligible legend drugs. Eligible non-legend drugs, when prescribed by a physician, will be payable at acquisition cost plus 50 percent plus 35¢ or acquisition cost plus professional fee, whichever is lower.

"Physicians holding dispensing permits issued by the department will be reimbursed at acquisition cost plus a dispensing fee of $1.00. This pricing formula

includes compounded prescriptions and over the counter items but excludes injectables not intended for self-administration by the recipient.

"Reimbursement to pharmacy providers will be for the balance due after the determination of the total charges appropriate for the services provided, less the fifty cents ($.50) co-pay fee for each prescription when applicable under the provisions of K.A.R. 30-5-21. The pharmacy provider shall collect the co-pay fee when appropriate."